THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Carrie L. Morse

v.

Interstate Cleaning Corp.

No. 01-C-081

ORDER

On August 12, 1998, Carrie L. Morse ("Plaintiff") slipped and fell at the Food Court of the Steeplegate Mall in Concord, New Hampshire while in the course and scope of her employment. As a result of this accident, the Plaintiff filed a workers' compensation claim with her employer's workers' compensation insurer, Royal & SunAlliance ("Royal"), who paid indemnity and medical benefits to the Plaintiff totaling $26, 543.66. The Plaintiff also filed a negligence lawsuit against certain Defendants, including Interstate Cleaning Corporation ("ICC"), the company allegedly responsible for maintaining and cleaning the floor at the Steeplegate Mall Food Court.

On April 9, 2004, a mediation took place between the Plaintiff and ICC in which the parties reached a settlement contingent upon court approval. Before the Court is the Plaintiff's and ICC's Motion to Approve the Third Party Settlement. Royal objects. The Court held a hearing on whether to approve the third party settlement on July 12, 2004. See RSA 281-A:13, III.

On August 30, 2004 the Court (Lewis, J.) granted New Hampshire Insurance Guaranty Association's ("NHIGA") motion to intervene. For the reasons provided below, the Court finds and rules as follows.

I. BACKGROUND

At the time of the Plaintiff's slip and fall accident, Reliance Insurance Company ("Reliance") insured ICC. However, on October 3, 2001, by Order of the Commonwealth Court of Pennsylvania, Reliance was declared insolvent. Because ICC is located in Missouri and the Plaintiff is a resident of New Hampshire, Reliance's insolvency triggered the applicability of Missouri's and/or New Hampshire's state insurance guaranty association laws.

New Hampshire and Missouri have adopted similar legislation which creates state insurance guaranty associations as non-profit entities. RSA 404-B:1, et seq; Mo. Rev. Stat. §§ 375.771, et seq.[1] The express purpose of New Hampshire's Insurance Guaranty Association Act is to:

> provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers.

RSA 404-B:2. A main purpose of the Missouri property and Casualty Insurance Guaranty Association Act is "to minimize the effects of insolvent insurers on innocent insureds and the public." Garrett v. Overland Garage & Parts, Inc., 882 S.W.2d 188, 193 (Mo. Ct. App. 1994). The term "covered claim" is defined, in part, as an "unpaid claim" that "arises out of and is within the coverage of" an insurance policy issued by an insolvent insurer subject to the guaranty association legislation. RSA 404-B:5, IV; Mo Rev. Stat. § 375.772, II(2).

[1] The pertinent Missouri statute was amended in 2004, but the amendments apply only to covered claims with respect to insurers that became insolvent after August 28, 2004. The Court thus refers to the pre-amendment version of the statute.

Both New Hampshire's and Missouri's insurance guaranty monies are funded by assessing member insurers within each state. RSA 404-B:8, I(c); Mo. Rev. Stat. § 375.775, I (3). In New Hampshire, the insurer passes the costs of these assessments onto the insured. RSA 404-B:16. In Missouri, assessed insurers are entitled to a credit against premium tax liability. Mo. Rev. Stat. § 375.774, III. As stated by the Massachusetts Supreme Court, in its interpretation of that state's insurance guaranty fund act: "[t]he cost of paying claims against insolvent insurers is thus ultimately passed on to the insurance-buying public." Clark Equip. Co. v. Massachusetts Insurers Insolvency Fund, 666 N.E.2d 1304, 1306 (Mass.1996)(internal quotation and citation omitted).[2]

Both New Hampshire's and Missouri's insurance guaranty associations are "obligated to the extent of the covered claims existing prior to the" insolvency. RSA 404-B:8, I(a); Mo. Rev. Stat. § 375.775, I(1). However, each association is limited in the amount it must pay on account of a covered claim. RSA 404-B:8; Mo. Rev. Stat. § 375.775, I(1).

At the April 9, 2004 mediation, the Plaintiff and ICC reached a conditional settlement for a total sum of $75,000. See Plaintiff's and ICC"s Mot. for Approval of Third Party Settlement and Request for Hearing Thereon at 3. $25,000 is allocated for attorney's fees, $4,324.98 is allocated for costs and disbursements and $45,675.02 is allocated for the Plaintiff. Id. The settlement expressly notes that no part of the settlement fund is to deal with any reimbursement of the $26, 543.66 past workers' compensation payments, or is to be available to enable any "holiday" for the workers' compensation carrier against payment of future compensation benefits. Royal objects to

[2] It should be noted that the resources available to the guaranty associations are not unlimited, but assessments against insurers are capped through formula. RSA 404-B:8, I(c); Mo. Rev. Stat. § 375.775, III.

the settlement because it claims that it has a statutory lien and a holiday that must be dealt with as a part of the third party settlement. The Missouri Property and Casualty Insurance Guaranty Association has been administering the claim and is committed to entirely fund the settlement. Aff. of Gerard Hosman at 2.

II. DISCUSSION

In support of the settlement, the Plaintiff, ICC and NHIGA argue that both New Hampshire and Missouri law prohibit Royal from recovering its statutory lien and asserting a holiday against the Plaintiff's net recovery. They assert that the policies underlying the pertinent insurance guaranty association laws dictate here that a solvent insurance company, like Royal may not have any recovery or benefit. Royal counters that: (1) the proposed settlement should not be approved because it is not just and equitable; (2) it has a statutorily guaranteed lien under RSA 281-A:13, I (b) which is a derivative claim that attaches to the settlement and no insurance guaranty association statute prohibits reimbursement of that lien; (3) insurance guaranty association statute(s) are ambiguous and should not be deemed to defeat its claimed rights under New Hampshire's Workers' Compensation statute; (4) denying the lien and holiday would impermissibly allow the plaintiff a double recovery; (5) the insurance guaranty association statute(s) do not deny it the right to the holiday; (6) even if the pertinent insurance guaranty association statute(s) prohibit the lien and the holiday, it still has a direct action against ICC; and (7) a denial of its statutory lien and holiday would violate its constitutional right to a legal remedy. The Court is not persuaded by Royal's arguments.

New Hampshire's Insurance Guaranty Association Act is "virtually identical in both purpose and language to statutes in numerous other States." N.H. Ins. Guaranty Assoc. v. Pitco Frialator, 142 N.H. 573, 577 (1998). It is much like that of the State of Missouri. Although New Hampshire's and Missouri's laws provide remedial compensation for claims against insolvent insurance companies, both statutes contain clear provisions that shift the burden of paying claims away from the insurance guaranty association assessment scheme and onto solvent insurers who have issued policies that otherwise cover the loss in question, at least to some degree. See RSA 404-B:5, IV; Mo. Rev. Stat. § 375.772, II(2). In that regard, the New Hampshire and Missouri insurance guaranty funds prohibit paying claims for "any amount" that is "due any . . . insurer . . . as subrogation recoveries or otherwise . . . ." RSA 404-B:5, IV; Mo. Rev. Stat. § 375.772, II(2). Moreover, both New Hampshire's and Missouri's statutes require claimants to exhaust payouts from applicable solvent insurance companies before seeking compensation from the guaranty funds. New Hampshire's Act provides:

> Any person having a claim against an insurer under any provision in an insurance policy other than a policy of an insolvent insurer which is also a covered claim, including but not limited to the provisions of uninsured motorist coverage of any policy, shall be required to exhaust first his right under such policy. Any amount payable on a covered claim under this chapter shall be reduced by the amount of any recovery under such insurance policy.

RSA 404-B:12, I. Missouri's Act provides:

> Any person having a claim against his insurer under any provision in his insurance policy which is also a covered claim shall be required to exhaust his right under such policy. Any amount payable on a covered claim under sections 375.771 to 375.779 shall be reduced by the amount of such recovery under the claimant's insurance policy.

Mo. Rev. Stat. § 375.778, I.

The Court repeats that an overarching purpose of each insurance guaranty association statute is to provide particular, but limited, protection to policyholders and claimants when an insurer becomes insolvent, and not to solvent insurers. See supra, RSA 404-B:2; Garrett, 882 S.W.2d at 193; see also Hunnihan v. Mattatuck Mfg. Co., 705 A.2d 1012, 1019 (Conn. 1997) ("An interpretation of the covered claim definition that excludes claims by insurers is in accord with this legislative purpose to provide protection for policy holders and claimants from insurer insolvency. The exclusion of claims by insurers leaves the risk of insurer insolvency on the insurance industry.").

Irrespective of the purposes and limitations of the pertinent statutes, and the express prohibitions against recovery due any insurer "as subrogation recoveries or otherwise", Royal maintains that the proposed settlement is not just and equitable with respect to itself and that it does not reflect the true value to the Plaintiff. Yet, and while it is certainly true that the settlements' net value for the Plaintiff is greater than it otherwise would be if Royal's workers' compensation lien and holiday had to be honored, Plaintiff's initial demand was $175,000.00 (see Pls. Pretrial Statement at 5), and this settlement was only arrived at in the context of Reliance's insolvency and with due regard for the consequent triggering of insurance guaranty association limitations and conditions. The Court does not deem the settlement, in the circumstances presented, to be unjust or inequitable to Royal, a solvent insurer. The settlement purports to deal with the Plaintiff's "covered claim(s)" and, consistent with the insurer insolvency situation, provides no relief for Royal.

Royal emphasizes the dictates of New Hampshire's workers' compensation statute which, according to Royal, entitles it here to its lien recovery irrespective of insurance guaranty association involvement. RSA 281-A:13, I (b) provides:

> [t]he employer, or the employers insurance carrier, shall have a lien on the amount of damages or benefits recovered by the employee, less the expenses and costs of action, to the extent of the compensation, medical, hospital, or other remedial care already paid or agreed or awarded to be paid by the employer, or the employer's insurance carrier's pro rata share of expenses and costs of action as determined in paragraph IV.

(emphasis added).

The Court recognizes that the "purpose of the [statutory] lien is to prevent double recovery by the employee." Beaudoin v. Marchand, 140 N.H. 269, 271 (1995). However, RSA 281-A:13, I does not expressly provide for such a lien when dealing with insurance insolvency circumstances and insurance guaranty association limitations, and Royal's arguments fail properly to consider the policies underlying the insurance guaranty association statutes. Read harmoniously with such statutes, the workers' compensation law does not provide recovery rights to carriers like Royal in circumstances, like here, of an insurer insolvency.

As stated previously, both New Hampshire's and Missouri's insurance guaranty association statutes prohibit payment to any insurer "as subrogation recoveries or otherwise." RSA 404-B:5, IV; Mo Rev. Stat. § 375.772, II(2). The Court construes the workers' compensation lien that Royal seeks here to assert to be akin to a direct claim for subrogation and thus barred under the pertinent statutes by the above referenced recovery prohibitions.

While RSA 281-A:13, I(b) specifies that a workers' compensation carrier "shall have a lien on the amount of damages or benefits recovered by the employee", and does not there expressly use the term "subrogation", the pertinent provisions dealing with third party liability later do provide that "[i]n any case in which the employee . . . neglects to exercise the employee's rights of action by failing to proceed at law or otherwise against the third party for a period of 9 months after the injury . . . the . . . carrier may so proceed and shall be subrogated to the rights of the insured employee . . . ." See RSA 281-A:13, III (b) (1) (emphasis added). The statutory lien here at issue is plainly akin to, if not a form of, subrogation.

Moreover, and while the New Hampshire Supreme Court has not squarely addressed the issue of whether a statutory lien under the workers' compensation statute is akin to, or a form of, a subrogation recovery, Missouri courts have addressed the issue. In Tillman v. Cam's Trucking, Inc., 20 S.W. 3d 579, 584 (Mo. Ct. App. 2000), the Court opined that it "considers the entire $70,441.92 Appellant received in settlement of his workers' compensation claim to be an amount due [his employer's] workers' compensation insurer as a 'subrogation' recovery within the meaning of § 375.772.2(2) , RSMo 1994 . . . . [T]he effect of that treatment is that Appellant's judgment against Respondents is deemed satisfied to the extent of $70,441.92." (emphasis in original). Similarly, in Garrett v. Overland Garage & Parts, Inc., 882 S.W.2d 188, 193 (Mo. Ct. App. 1994), the Court found that the judgment at issue in that case "must be deemed satisfied for the amount due the compensation carrier by the right of subrogation because it is not a covered claim under . . . [the Missouri guaranty fund statute because] the statute

precludes recovery of the subrogation amount from the tortfeasor."[3] See also Pitco Frialator, 142 N.H. at 579 (1998) ("[T]he conclusion that RSA 404-B:12, I, applies to a party's right to workers' compensation benefits comports with the statute's overall objective: establishing . . . {New Hampshire's Insurance Guaranty Association] as an insurer 'of last resort'" (citation omitted).

Even if a workers' compensation lien is not deemed to be akin to, or a form of, a "subrogation" recovery, both New Hampshire's and Missouri's insurance guaranty association statutes bar claims for amounts due any insurer "as subrogation recoveries or otherwise." (emphasis added). The Court construes the language "or otherwise" as broad and encompassing the statutory lien that Royal is asserting here. See e.g. Hunnihan, 705 A.2d at 1018. In Hunnihan, the Connecticut Supreme Court held that the Connecticut Insurance Guaranty Association was not obligated to pay a proportionate contribution toward a workers' compensation award when the former insurer, from whom reimbursement otherwise would have been sought, had previously been declared insolvent. The Court stated, among other things, that the Connecticut legislature's use of the term "otherwise", in the phrase "the covered claim shall not include any amount due any . . . insurer . . . as subrogation recoveries or otherwise . . . .", id. (emphasis added) [quoting General Statutes § 38a-838 (6) (c)], "provides a strong indication that under the guaranty act, all claims by insurers [including workers' compensation insurers] are excluded from the definition of a covered claim." Id.; see also for like rulings Maxwell Communications v. Webb Publishing, 518 N.W. 2d 830, 833 (Minn. 1994) ("The

[3] The cited decisions deemed workers' compensation liens to be a form of "subrogation recovery" despite a caveat in the Tillman case that the Missouri workers' compensation lien statute as considered in earlier cases, was not seen as given "a true subrogation right" but rather a form of "indemnity, and not true subrogation . . . ." Tillman, 20 S.W.3d at 582, n. 6.

members of the insurance industry itself bear the risk of their own direct claims against the insolvent carriers . . . . In other words, the Guaranty Act does not provide a solvent substitute for an insolvent insurer . . . ."); Ursin v. Ins. Guar. Ass'n, 412 So.2d 1285, 1289 (La. 1982) ("The [or otherwise] language is very broad and seems to encompass amounts due an insurer for any reason whatsoever."); Ferrari v. Toto, 417 N.E.2d 427, 429-430 (Mass. 1981).

Royal also argues that it is not subject to the statutory prohibitions contained in the insurance guaranty association statutes because it is not making a direct claim against the guaranty association, but rather advances a "derivative" claim that attaches to the Plaintiff's settlement proceeds. The Court is not persuaded. Royal's claim falls within the statutory prohibitions.

Further, Royal's argument that, in the circumstances presented, it may seek recovery directly or "derivatively" against ICC ignores the immunity provisions afforded to insureds of insolvent insurers, such as ICC, contained in the guaranty association statutes. Specifically RSA 404:5, IV provides in pertinent part that "[a]ny such claim [as to subrogation recovery or otherwise] asserted against an insured or an insurer which has become insolvent shall have as its exclusive remedy a direct claim against the assets of the insolvent insurer filed with the liquidator . . . ." Similarly, Mo. Rev. Stat. § 375.772, II(2) provides in pertinent that "there shall be no right of recovery by any person against a tortfeasor insured of an insolvent insurer, except that such limitation shall not apply with respect to those amounts that exceed the limits of the policy issued such tortfeasor by the insolvent insurer." In view of the above statutory provisions, the Court rejects Royal's argument that it has a direct or "derivative" action against ICC.

The Court also rejects Royal's argument that it should be entitled to use proposed settlement proceeds funded by guaranty association monies as the basis for a holiday from paying future workers' compensation payments in the future. See in this regard, In re Dufresne's Case, 743 N.E.2d 850 (Mass. App. Ct. 2001), where the Massachusetts Appellate Court denied a workers' compensation carrier the right to use an employee's net or "excess" recovery from a third party to offset future workers' compensation payments. The Massachusetts Appeals Court stated among other things that:

> when the third party insurer is insolvent and indemnification is available to the injured person only through the . . . [guaranty fund] as a substitute for the insolvent insurer . . . . distributions from the . . . [guaranty fund] are limited to covered claims . . . [and] exclude insurers and the insured of insolvent insurers. These exclusion reflect the . . . [guaranty fund's] purpose to indemnify injured persons, not the insurance industry.
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> The difficulty in this case is that it is an insolvency case, not an ordinary third party proceeding. The settlement fund, including the 'excess' held by the employee, came from assets of the [guarantee] Fund . . .[and] the Fund may not pay out its assets if the ultimate beneficiary is an insurance company.

Id. at 853, 855. (citation omitted); see also Davis v. Southern Gulf Transp. Inc., 493 So2d. 729, 731 (La. Ct. App. 1986).

Finally, the Court finds no merit to Royal's contention that approval of the settlement, in the circumstances presented, would result in a violation of the constitutional right to legal remedy under N.H. Constitution, Part I, Article 14.

Accordingly, and for the reasons provided above, the Court **APROVES** the proposed settlement agreement. The settlement reflects a proper resolution of the matter, consistent with pertinent statutes.

So Ordered.

September 21, 2004

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John Lewis,
Presiding Justice